Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE,

Plaintiff,

Case No. 16-13174

-v-

DAVID H. BAUM, et al.,

Defendants.
_____/

MOTION AS TO IMPOSITION OF A REMEDY

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
February 14, 2019

APPEARANCES:

FOR THE PLAINTIFF: **Deborah L. Gordon**
Deborah L. Gordon PLC
33 Bloomfield Hills Parkway, Suite 220
Bloomfield Hills, Michigan 48304

FOR THE DEFENDANT: **Brian M. Schwartz**
Miller, Canfield, Paddock & Stone, PLC
150 West Jefferson Avenue, Suite 2500
Detroit, Michigan 48226
and
David W. DeBruin
Jenner & Block LLP
1099 New York Avenue, N.W., Suite 900
Washington, DC 20001

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Detroit, Michigan

February 14, 2019

2:10 p.m.

* * *

THE CLERK: All rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable David M. Lawson presiding.

THE COURT: You may be seated.

THE CLERK: Now calling the case of Doe versus Baum, Case Number 16-13174.

THE COURT: Good afternoon, Counsel. Would you put your appearances on the record, please.

MS. GORDON: Deborah Gordon on behalf of the plaintiff, your Honor.

MR. DeBRUIN: Good afternoon, your Honor. David DeBruin for the defendants.

MR. SCHWARTZ: Brian Schwartz for the defendants.

THE COURT: The case is before the Court on the plaintiff's motion and brief with respect to the imposition of a remedy.

When this case was remanded by the Sixth Circuit, we had a conference and I was puzzling, I believe, with counsel over the vehicle, the proper vehicle to bring the matter back before the Court to discuss, I guess, where we go from here.

And I have a motion in which the plaintiff has

indicated that the Court should proceed with issuing certain injunctive relief consisting of vacating and expunging the finding of responsibility and the sanctions and other actions taken by the university, and also vacating and expunging the no-contact and permanent suspension order that was issued back in June of 2016, expunging all the documents involving the investigation and findings, enjoining the university and the defendants from disclosing any information to third parties, enjoining the university and the defendants from disclosing the plaintiff's identity to third parties, although I'm not sure that that's particularly contentious here, and also awarding the defendant a degree from the Ross School of Business, and damages in excess of approximately $30,000 in tuition, which I suppose I could characterize as cover, because he obtained a degree elsewhere.

Some of that strikes me as sensible, other parts of that are somewhat remarkable given the fact that when you look at the case, we're really not even beyond the pleading stage, but nonetheless, that was the request.

The defendants have filed a response to that motion, and I think I'm pretty clear about the parties' respective positions, but Ms. Gordon, why don't you start and go ahead and hit your highlights, if you please.

You can do that from this lectern here or your seat, wherever you --

MS. GORDON: Ill go here, Judge.

THE COURT: That's fine. That's fine.

MS. GORDON: Okay. The university has contested every single thing I have asked for, which was a surprise, because when we met in your office I thought, based on what the Court had done in Doe versus Alger and Doe versus GMU, with the orders that had been issued with regard to, you know, immediate equitable relief, some of the things seemed mandatory.

THE COURT: Well, you know, I think the way I'm looking at this case, the posture of it now is that the motion to dismiss is a dead letter, because it's essentially denied by the Sixth Circuit, and what's been revived is your motion for preliminary injunction. So here we are with that.

MS. GORDON: Well, I don't agree with that, Judge. I think the Sixth Circuit has already ruled that my client's constitutional rights were flatly violated.

THE COURT: That can't be, because the case was only -- it wasn't at a summary judgment stage.

MS. GORDON: Okay.

THE COURT: And you never filed a motion for judgment on the pleadings.

MS. GORDON: Well, I will do so now, then. But the Sixth Circuit has made a decision with regard to a due process violation as a matter of substantive law; not on the TRO,

on -- you dismissed my case on the merits --

THE COURT: I did.

MS. GORDON: -- on a 12(b)(6). So this didn't go up on a TRO. This went up on a final order of the Court, that you had granted the 12(b)(6) and denied my motion for reconsideration.

THE COURT: Sure. And when that decision is reversed that means we're back to where we started. The 12(b)(6) motion is denied.

MS. GORDON: Excuse me, Judge. I just want to grab the opinion.

THE COURT: And the case moves forward.

MS. GORDON: Okay. I don't believe -- I believe the posture that we're in here is just like the Doe versus Alger case where the judge granted summary judgment for the plaintiff. And with granting the summary judgment for the plaintiff, the plaintiff was then entitled to immediate relief.

Let me go to Goss versus Lopez, Judge, which is, as we know, a U.S. Supreme Court case. And what the U.S. Supreme Court case said there was, "The three-judge court declared that plaintiffs were denied due process of law because they were," quote, "suspended without hearing prior to suspension or within a reasonable time thereafter. It is ordered that all references" -- excuse me -- "thereafter and that

regulations pursuant thereto were unconstitutional in permitting such suspensions. It was ordered that all references to plaintiffs' suspensions be removed from school files. Because the order below granted plaintiffs' requests for an injunction ordering defendants to expunge their record, this court has jurisdiction of the appeal."

The court went on to rule that the judgment against -- or excuse me -- the finding against the plaintiffs in that case was invalid and that, therefore, the findings would be vacated, period, full stop.

Let me move on to Carey versus Piphus, where the court, the U.S. Supreme Court found --

THE COURT: What were you reading? What did you just read from, Goss versus Lopez?

MS. GORDON: Yes.

THE COURT: Okay.

MS. GORDON: I sure did.

Now I'm moving on to Carey versus Piphus where, again, the court says, "The right to procedural due process is absolute. It does not depend on the merits of a claimant's substantive assertions because of the importance to organized society that procedural due process be observed. We believe that the denial of due process should be actionable for nominal damages without proof of actual injury."

So to the extent the Court is now entertaining the

idea that somehow the case is just getting off the ground and you will now make a ruling, I guess it will have to be in comportment with the Sixth Circuit. I'm unclear, then, about the directive to come to you with a remedy, because you directed us to approach the Court with remedies.

I don't think anybody can doubt that the Sixth Circuit has thrown out the University of Michigan's policy, period, full stop, exclamation point. That case is the law of the Circuit. And throughout the Circuit, people are -- some are, some aren't -- following with the law that says you must have cross examination in a hearing. I see no way, your Honor, that this Court is going to rule otherwise.

So if I need to present an order to this Court codifying for the District Court level the fact that the University of Michigan's policy -- which, by the way they have now agreed in their legal papers to the Sixth Circuit was unconstitutional, they literally say that -- I fail to see, your Honor, how we are going to start from square one.

I will move on to say that because I have obtained this relief on behalf of my client and had the policy thrown out, my client is automatically entitled to vacation of the unconstitutional findings made against him. That must happen now. I don't think this Court has any alternative.

THE COURT: Are you suggesting that the university is contesting that aspect of your request?

MS. GORDON: Yes. They literally said -- this is why I started out by saying how surprised I was.

THE COURT: Yeah.

MS. GORDON: Because we sat in your office and I thought we were all -- I realize they didn't like everything I said, but I felt that they were -- you know, got the basics, which are, interim attorney fees are allowed because there has been a substantial change between the parties, and we have won substantial relief which will not be changed. The Sixth Circuit -- they have dropped their appeal to the U.S. Supreme Court, or never made one, and the en banc was denied.

So I have now a situation where we have the law of the Circuit that is not going to be undone by this Court, no matter what you rule with regard to John Doe here. That law will remain. So with that, I get my interim fees. They cite -- excuse me -- they cite --

THE COURT: Tell me again about the authority for interim fees.

MS. GORDON: The authority for interim fees is extremely clearcut. Doe versus Alger, which is the case in the Second Circuit --

THE COURT: That was a summary judgment case; right?

MS. GORDON: Yes, it was. And the judge granted summary judgment for the plaintiff, and with that the judge awarded significant relief, including vacation of his record,

all the things you just read for -- read from with regard to the no-contact order being dissolved, him being able to be in good standing at the school, and so on. That's what -- there is an order that I attached to my reply, which is the Alger judge's ruling, your Honor, which is quite extensive and detailed.

Now, let me tell you that she issued that order as interim relief. Okay? So if you look at her order, she says there, okay, this stuff is a basic. This is going to happen for sure. Now, once we get the for-sure stuff down, what's going to happen to John Doe? Okay?

John Doe starts with a clean slate. Now what happens to him? Does he want to be reinstated? The judge in Doe versus Alger said, if he wants to be reinstated -- he was new in his career at the school, I think he was like a freshman, and he was only suspended, he was not expelled or forced to withdraw like my client. The judge said, okay, if you are going to be -- you get all this interim relief and you are going to be reinstated, John Doe, and if you want to then turn around and withdraw, we say good-bye to you, and that's the end of the case. But if you want to be reinstated and continue to take classes, now you are going to have to go back to their panel and their process and let the university adjudicate misconduct.

Okay. In Doe versus George Mason University, it was

very similar facts to Doe versus Alger. And in George Mason University, the judge took a little different position. He ordered all the same relief that the judge in Doe versus Alger did, strictly on a summary judgment decision. That was it. And he said, but I'm not going to make John Doe, in my case, go back to the appeals board, because just like here the plaintiff had won below in, let's call it, the OIE investigation at George Mason University, but it was on -- then there was an appeal. And the judge in George Mason said, okay, there is no appeal required here under their own policy.

THE COURT: Well, actually, there was no appeal allowed under their policy.

MS. GORDON: Fair. But they took one.

THE COURT: Right. And that was really the distinguishing factor.

MS. GORDON: Well, yes. But I have a similar situation. I have a situation where the court -- excuse me -- the university took on an appeal, but threw aside the criteria for the appeal. So the OIE finding, in my opinion, needs to be reinstated depending on what we're doing with this case. But this is a very complicated situation.

But as to vacating my client's record -- and by the way, defendant is wrong when they state in their papers that the record has been vacated. That's flatly a false statement.

THE COURT: Tell me the situation there.

MS. GORDON: Okay. My client was forced to withdraw. When he withdrew, he was told point blank -- if you look at Exhibit 2 to my original papers, my original brief, I have attached the letter he received from the University of Michigan. And in that letter he is told that he will have a permanent record.

Now, it's not going to be on his transcript, but it resides in their files. And he is also told that he better be careful about how he answers questions with future employers or other educational institutions, because he must be honest and say there was a finding against him, and we all know and understand that.

THE COURT: So it's your understanding that when the defendant says that the record expungement has been taken care of, it hasn't, with respect to the lingering vestige of whatever that is in the university's file?

MS. GORDON: It's nothing lingering, Judge. It's a flat-out finding that my client engaged in sexual misconduct. That is nothing lingering. That is --

THE COURT: Well, of course it's lingering, because it's still there.

MS. GORDON: Well, fair enough. But I don't mean it's something minor. I mean it's like it's not something that's on the side bubbling around, that is a fact of life, and that needs to be vacated, because that was reached with an

un -- with a process we all know now to be unconstitutional.

So there's no way that the University of Michigan can continue to have a finding in its files and records against my client that he violated their policy. And there is no case that says otherwise.

They have cited to a couple of cases for things like condemnation or, I'll call them, food stamps. I mean, I may be wrong, but it's a government administrative agency. There is not a single case where a student is involved and the student was found to have been removed from the school without due process, a procedural due process, a court has not said, of course, he immediately gets his record corrected.

And the materials I put in front of your Honor which you read earlier all came from the Doe versus Alger judge in her order, which is quite thorough.

What she didn't get into, as I said, is what are we going to do if he decides to take classes? But there was no question in her mind or the George Mason University judge's mind or the Goss court's mind that these records are vacated. And this has now got to be number one for my client, to remove this cloud where he continues to have to say he has been found guilty of sexual misconduct.

THE COURT: Okay. Move on to whatever else other forms of relief you would like to talk about.

MS. GORDON: Okay. So interim fees are the same

thing. I have covered them thoroughly in my -- in my -- not thoroughly; I had limited pages, rightly so.

But interim fees, I'll read you from Woods versus Willis, Sixth Circuit 2015, "To be a prevailing party plaintiff must have done more than bring a lawsuit that achieved the desired result of catalyzing a voluntary change. Plaintiff must have been awarded summary relief by the courts resulting in plaintiff receiving a judicially-sanctioned change in the legal relationship of the parties. The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship."

That has occurred here under all case law, Judge. There is absolutely no question about it. And I'm entitled to my fees and costs now.

THE COURT: Aren't you required to have a judgment?

MS. GORDON: Yeah, well, I can submit a judgment, yes. I think that's a possibility. These other cases, they are in summary judgment. I can certainly submit an order to this Court with regard --

THE COURT: What do you mean, you can submit an order to this Court?

MS. GORDON: I can request an order from this Court, Judge Lawson, that's what I meant.

THE COURT: By filing a motion of some sort?

MS. GORDON: Of course. Or perhaps today we can

resolve that. I mean, I don't think it's going to be difficult to decide what the order is going to say. It's going to say that the University of Michigan's policy as applied to the plaintiff was unconstitutional.

I mean, I can file a summary judgment, if you want to go down that road. I need some guidance from the Court.

THE COURT: Well, the guidance would be that we would enter a scheduling order, the parties would take their discovery, which you want to do on your Title IX case.

MS. GORDON: Right. Right.

THE COURT: And then we would follow the conventional process that's laid out by the Federal Rules of Civil Procedure.

MS. GORDON: Okay. I don't -- I don't agree that that's the process. I agree that right now I'm entitled to interim relief. I don't think there is any question legally about it, and the defendant does not say there is anything either. They don't cite a single case where I have to -- before I get my interim relief of vacating my client's record. What law would not allow me to have my client's record vacated?

THE COURT: Well, we have moved on from that, Ms. Gordon.

MS. GORDON: Okay. Well, Judge, you seem very -- I just want to be sure that we're -- everybody is on the same

page here with regard to what the law is, because I know of no law where my client cannot have his record vacated.

THE COURT: Ms. Gordon, I hear you about that.

MS. GORDON: Okay. All right.

THE COURT: I thought you were talking about interim attorney's fees as opposed to other kinds of relief. But be that as it may, do you have anything else you want to say?

MS. GORDON: Yes, I do. I have quite a few other points to mention, Judge.

I do want to -- what I am recommending is, because the Court is going to hear from the university in a moment, that what they want is more process from my client. So I have a couple of things that I must make the Court aware of in that regard.

The university issued what they called an interim procedure on January 9, 2019.

THE COURT: Oh, this year?

MS. GORDON: Yes.

THE COURT: Tell me about that.

MS. GORDON: Post -- okay. So post Doe versus Baum.

THE COURT: Mm-hmm.

MS. GORDON: So University -- Doe versus Cincinnati, Judge, came down in the fall of 2016 -- '17. That was right around the time we were in front of your Honor, and that was brand new law. So on the heels of Doe versus Cincinnati,

where the Cincinnati court said very specifically that you must have a hearing and both sides must be able to question one another at the hearing, but in Cincinnati, Judge, there was only one policy. It wasn't like U of M, where there's these dual policies, one for everybody else and one for sexual misconduct, and over here they have a complete hearing and over here you have no hearing.

So the University of Michigan continues to want to not provide a hearing. So even after --

THE COURT: You mean still a bifurcated system?

MS. GORDON: Yes. Absolutely.

THE COURT: All right.

MS. GORDON: Absolutely. And I have got a case in front of Judge Tarnow which is now in the Sixth Circuit where he has ruled that the statement of student rights and responsibilities, which is the longstanding policy that applies to everybody else, should apply to sexual misconduct cases.

THE COURT: Was Judge Tarnow's case a sexual misconduct case?

MS. GORDON: Yes, it is, Judge.

THE COURT: All right.

MS. GORDON: It's virtually the same thing as what's in front of your Honor, an OI investigation and the like.

Okay. So --

THE COURT: Sorry to dwell on this. Did it go through an investigator's summary and then an appeal to a three-member board?

MS. GORDON: Yes. So let me explain that. So if I can just back up for a second.

So after Doe versus Cincinnati came down the University of Michigan scrambled, and in the following February of '18 now, a year ago, they created a new policy. And there is no doubt about it, they tried to work -- do a workaround around Doe versus Cincinnati. And when I was at the Sixth Circuit arguing this case, Judge Gibbons said, "I fail to see why the University of Michigan continues to deny" -- "defy the Sixth Circuit." She said that at oral argument and I have included it in my papers.

And what she meant by that was, after Doe versus Cincinnati, the University of Michigan continued to deny a hearing to students accused of sexual misconduct. The university continued to not allow students to question one another in any format. They continued to have what they called a private investigator model where there was interviews.

THE COURT: And you're still speaking about sexual misconduct cases?

MS. GORDON: Yes. This now, the policy I'm in front of Judge Tarnow with. So we have moved on from the policy

that was in front of your Honor, and I have now moved to their January -- their February 2018 policy in front of Judge Tarnow, post Cincinnati. This is their plan that they have come up with.

And Judge Tarnow grants my TRO and he says, "No, under Doe versus Cincinnati, you have to have a hearing and you have to have some form of questioning." And Judge Tarnow said, "I am ruling that the statement of student's rights and responsibilities which allows for a full hearing applies, but I will do a carve-out and I will say that as the court said in Doe versus Cincinnati, you can question each other via written questions." Okay?

Off we went to the Sixth Circuit, because this was a TRO, and they had a right, of course, to an appeal on a TRO. Now there's cross appeals. So they have argued that they don't want to go to the statement of student's rights and responsibilities as ordered by Judge Tarnow. They don't want to give that kind of a hearing to students accused of sexual misconduct. They want to create their own policy, they say. And now they have done that as of a few weeks ago.

THE COURT: And tell me about it.

MS. GORDON: That's the January 9 policy. I have taken the position in the Sixth Circuit --

THE COURT: No, just tell me what the policy is.

MS. GORDON: It's unconstitutional with regard to

hearings.

THE COURT: No, tell me what they are doing.

MS. GORDON: Okay.

THE COURT: What is the practice?

MS. GORDON: Okay. So what the practice is, and it's attached to defendants' papers as an exhibit, is that they are going to allow a hearing where they say -- I'm sorry -- they say in their policy, you may get a hearing. The word "cross examination" does not appear anywhere in the document which is about 40 or 50 pages. And what they say is that there will be a hearing officer assigned by the Office of General Counsel and the Dean of Student Affairs and that that hearing officer will be allowed to ask questions of the parties after investigation.

THE COURT: Oh, is that like the level one procedure here?

MS. GORDON: No. There was no --

THE COURT: Is that what we're talking about?

MS. GORDON: There was never a time here where people gathered in one room and, for example, the hearing officer could --

THE COURT: Oh, the hearing officer is not like the investigator?

MS. GORDON: Exactly. Exactly. There would be some investigation here, but then it would go to a hearing, which

we never had here --

THE COURT: Yeah.

MS. GORDON: -- in our policy, Judge. They didn't even offer that much.

So now they go to a hearing and the hearing officer asks the questions. And then the policy says that the parties may do, quote/unquote, follow-up after the investigation, after the hearing officer's questions.

I brought with me a statement from President Mark Schlissel that he issued on January 29, 14, 15 days ago, where he said in a community letter that he does not agree with Doe versus Baum and that he believes that there should be the single hearing officer model with only follow-up questions allowed. So the university is continuing to dig in their heels. They have made it extremely clear that this new policy will not track Doe versus Baum.

You'll hear from Mr. DeBruin that it does. I'm here to tell you, I'm challenging it, and I have already filed a challenge in the Sixth Circuit in the Judge Tarnow case.

THE COURT: So is all of this sort of leading to your request that they not be able to do that while this case is pending here in your -- with Mr. --

MS. GORDON: Well, here's my point: I don't think they can do it. I mean, there's -- it's so impractical. Our case is unique, Judge, because don't forget, the complainant

sued my client in Washtenaw County, okay? I have nine depositions.

THE COURT: Is that case still going, by the way?

MS. GORDON: Oh, no. That's long over. Long over. But in the meantime --

THE COURT: Did it go to a verdict?

MS. GORDON: Oh, no, no, no, no, no. Uh-uh.

In any event, there's nine depositions. We have already gone so far in this case that have bubbled up from this complaint and was in front of your Honor and was in front of Washtenaw County, we have gone so far past what the OIE ever would do or could do. We have -- I have an incredible record of half-day-long or day-long depositions under oath.

THE COURT: I don't think you mean to say an incredible record, do you?

MS. GORDON: Incredibly large record compared to an OIE investigation. I mean, an OIE, there is no oath, there is no half-day interview, it's -- I mean, I have a very extensive -- I'll change "incredible" to "extensive." I have gone way beyond what would ever happen.

So what I am recommending to the Court today is, I'll pick up where you left off, let's set a schedule. I think the findings should be vacated against my client immediately and I will take whatever steps are necessary to file the appropriate motion to do that. I take your point about there is no

judgment, but there should be. And I think there can be and will be. I will do that.

I want the findings vacated. I want my interim fees. And then I think we should do discovery on Title IX and due process and we should have a trial. And the trial should be on this: Not going back to the university. Just like in Carey versus Piphus, in Goss versus Lopez, they didn't send those students back to more process at the schools. They said the factfinder at the court will make these decisions.

I know your Honor had the Pucci case against, I think, the 37th District Court.

THE COURT: Whatever -- it was Dearborn, wherever that is.

MS. GORDON: Wherever it was. But the point there was, it was similar. It was an employment case with a denial of procedural due process. You put the case to a jury to decide whether or not the plaintiff -- whether there was just cause for her termination. It was a jury decision. You didn't send it back to the court.

At the same time that was going on, I had a similar case in front of Judge Borman which also went to a jury trial called Barachkov versus the 41st District Court. I have had multiple trials in this building in employment cases where my client was denied procedural due process and it goes to the jury to make the finding as to whether or not the person would

have been fired anyway.

And I must say, in that situation, the burden is on the defendant to prove that but for their denial of due process the person would have been terminated anyway.

So what I'm saying to you here is, sending us back to U of M for more process is a non-starter. I am going to contest their policy. I'm going to say it's unconstitutional. I'm going to say it's too late. Many witnesses are gone.

They have -- the whole process is run by the named defendants, literally. It's not as if to say one investigator might have a bias, literally the entire -- every decision that will be made about the process will be made by named defendants.

So I am requesting the remedial relief that I have already asked you for. And then I'm asking for discovery and a jury trial, a joint jury trial on the Title IX and the procedural due process.

THE COURT: All right. Thank you.

Mr. DeBruin?

MR. DeBRUIN: Thank you, your Honor. Let me state at the outset that I want to make it clear that the university does not seek to be unduly contentious in this matter. We are not trying to be. We have already cleared his record from the university.

THE COURT: What does that mean?

MR. DeBRUIN: Well, the -- so, again, student records consist essentially of two different types. You have got academic records like transcripts. Those records were always clean in this case. As part of the original agreement with the plaintiff, he left the university with a clean transcript. He was able to seek a copy of that transcript to give to other schools. There was nothing on it referencing any allegation of sexual assault, any misconduct finding.

Students also have student conduct files. Those files are confidential. You can't walk into the university or anybody else and say, "I would like to know what's in John Doe's student conduct file." Those records are all governed by a federal statute that preclude exclusion of any information in those files, the Federal Educational Records Privacy Act or FERPA.

THE COURT: Did you say exclusion or disclosure?

MR. DeBRUIN: Any disclosure of the information in those records.

THE COURT: You said exclusion, though. I'm trying to -- did you misspeak or are you referring to something else?

MR. DeBRUIN: I may have misspoke.

THE COURT: Okay.

MR. DeBRUIN: I apologize.

THE COURT: No, I'm just trying to be clear.

MR. DeBRUIN: So there was a reference when he

withdrew from the university -- his transcript was clean, but there was a reference in his student conduct file to the finding of misconduct.

Now, even there that reference could never be disclosed to anybody without the plaintiff's consent, and so when he did seek enrollment at another university, he came to the university to discuss with us what he could say about that, what we would say. We worked that out with plaintiff's counsel. But those records are protected even when there was a finding.

After the Sixth Circuit --

THE COURT: But they are not expunged?

MR. DeBRUIN: After the Sixth Circuit --

THE COURT: They are not expunged; correct?

MR. DeBRUIN: Well, I'm about to address that.

THE COURT: I'm sorry. Go ahead.

MR. DeBRUIN: After the Sixth Circuit ruled, and without any order from this Court, an entry was made in that file that that finding was vacated, could not be relied upon for any reason, was essentially wiped clean. And so in terms of a practical expungement, it has occurred, and there is really nothing to fight for that. We're not trying to fight for that. We would not disclose any information in that file at any time without express consent from the student, in any event. So I feel like we're fighting over something that I

don't understand what we're fighting about.

THE COURT: Okay. Let's move on, then.

MR. DeBRUIN: So I think as I approach this, and the papers before the Court, I think it is important to just think clearly, because we have got lots of different requests for relief going in many different directions. And I believe it is significant, as the Court stated when you came out, that the plaintiff has not yet prevailed on any claim.

The Circuit stated that the plaintiff has adequately pleaded two different claims for relief. There has been no motion for summary judgment, no motion for partial summary judgment, no motion for judgment under 54(b) on a portion of the claim.

And why does that matter? That matters because normally proof of injury and entitlement to relief and what to relieve, those are all some components of a claim. Those are all components of a judgment. They are all components of an order of this Court. And so here we've to some extent jumped to issues of relief without addressing issues of injury, without addressing issues of relief based on what?

Now, the Court, when you called us together --

THE COURT: Well, I don't know if Ms. Gordon agrees, and I take it from her comments that she doesn't, but I am approaching this move towards some interim relief as adjudicating her motion for preliminary injunction, and that,

in my view, properly places before the Court the opportunity to address some of the things that she is asking for. So that's the procedural context, if you will.

Now, I agree with you that it's inappropriate to enter judgments unless everybody has due process, including the defendant in this case.

By the way, have you filed an answer to the complaint? I don't remember if there was an amended complaint or not, but have you filed an answer to the complaint?

MR. DeBRUIN: Your Honor, I --

THE COURT: My law clerk suggests to me that you have not answered the complaint.

MR. DeBRUIN: Well, again, we moved to dismiss the case, as you know, early on.

THE COURT: Right.

MR. DeBRUIN: It was more or less contemporaneously with the motion for the injunction. Those were briefed together.

THE COURT: Well, I'm not suggesting that you should have, necessarily, but if you haven't, you need to do that.

MR. DeBRUIN: Well, we will do that. I mean, the Court called us together shortly after the Sixth Circuit decided the appeal. We had a meeting in chambers to address somewhat informally, if you will, what does it make sense in terms of where the case should go. And we were more than

willing to embark upon that conversation and that's, I think, in some ways what these pleadings were designed to address.

And the Court also raised the issue of, is there any prospect that we could try to resolve this through a settlement conference, which we would be open to, as well.

But laying all of that aside, what the -- what has been decided in this case, laying aside the formalities that we don't yet have any judgment on any claim is, there has been a decision that there was a deprivation of the plaintiff's due process rights. And we concede that that element of the case, in essence, was resolved by the Circuit. We're not trying to suggest otherwise.

There are two clear remedies for a due process violation standing alone. The normal remedy, case after case, is that the normal remedy for a violation of due process is process, is to provide the process that was denied. And in this case, there has been a review of the university's procedures, and we will talk about those in a minute. Those procedures were found to be inadequate.

And so the normal remedy for a due process violation is to provide the procedures in the context at issue, in this case, a resolution of a sexual assault complaint that was brought by another student, not brought by the university, that under Title IX we have an obligation to adjudicate. There was a finding that we didn't adjudicate that properly

under the due process clause. There is an allegation that we didn't adjudicate it properly under the -- under Title IX.

Either way, it doesn't really matter, because the holding of the Sixth Circuit is, we didn't adjudicate it properly, so the remedy is, and we concede, that we should be required to adjudicate it in an appropriate way. We're prepared to do that.

THE COURT: Well that is a remedy.

MR. DeBRUIN: All I'm saying is, that is the typical remedy for what's been established so far.

THE COURT: Well, maybe yes, maybe no. I'm not sure I agree. But it's a typical remedy. Damages certainly are -- is a remedy as well.

MR. DeBRUIN: Yes. And that was the second component I was going to say. So just focusing on, you have established a violation of due process, what normally flows from that standing alone, normally what flows is more process and the potential for damages. But both the Supreme Court in Carey versus Piphus and the Sixth Circuit in Newsome, I'll address both of those, made clear that you're not entitled to proof of damages absent proof of actual injury, which courts recognize you have to separate.

THE COURT: Right. And I don't think Ms. Gordon is asking for anything else. She said she wants --

MR. DeBRUIN: I don't think she is.

THE COURT: She said she wants a trial.

MR. DeBRUIN: Well, but that's not what she sought in these papers that are before the Court. In these papers she was not asking for more process, she was not asking for a hearing, and she is not asking for an award of damages, although I guess maybe this request for cover.

But normally the damage -- what the courts have made clear in Carey versus Piphus is that you have to separate the damages from a procedural due process violation from the damages of whether or not the person was wrongfully found to be responsible for something that he should haven't been found responsible for. So those are two separate components.

There has been a holding of a due process violation. There has not been a finding that he was wrongly found involved. That will require either a further adjudication by the university, which is the typical outcome, that's the outcome in Alger, that's the outcome in the GM -- the George Mason case, or at a minimum, if for some reason that was not possible, it could be that there would be a hearing before the Court. But that's going as to whether there was a wrongful finding of -- whether a termination or an expulsion from the school on the merits of the decision.

There still can be, the courts have said, damages for the denial of due process alone, the fact that "I felt like my rights were violated." You have to separate those. You're

not entitled to damages absent proof of a separate injury. You can get nominal damages. But, again, those are not the things that I submit are before the Court.

So in terms of what is before the Court, I think it's helpful to walk through them, because, again, there is a request for a degree, for the costs of his obtaining a degree somewhere else. And as to those things, I think the Circuit decision in Newsome is particularly clear and is directly on point. And again, we highlighted this in our response papers.

But the court, the Newsome case in the Sixth Circuit is a similar case involving student misconduct findings, review by the court as to whether process was adequate or not, rejection of several claims that the process was inadequate, including a claim there should have been cross examination. The court said, no, there was no need to cross examination in that case, but there was another due process violation the court sustained.

And then it turned to the issue of remedy. And the court said, "To the extent that Newsome seeks money damages to compensate him for the violation of his 14th Amendment right, he must demonstrate on remand that he suffered actual injuries such as mental and emotional distress caused by the violation -- the violation of due process."

But then the court goes further and says, "To the extent that Newsome seeks reparative relief aimed at restoring

him to the position he would have occupied but for the due process violation, he is entitled to such relief unless the school district can prove by a preponderance of the evidence that even had it not deprived Newsome of his right to procedural due process, he would still rightfully have been expelled."

So clearly as to the substantive relief, a degree, cover, anything going to a wrongful finding of student misconduct, all of that is premature for the reasons that we said.

THE COURT: You're not suggesting it's unavailable, you're just suggesting we're not at that point yet?

MR. DeBRUIN: Exactly. We're clearly not at that point yet.

So today counsel for plaintiff, I submit, has shifted a little bit and now says, well, there should be a hearing before this Court, not a remand to the university. Multiple courts have addressed that question of whether -- if there has been a procedural violation at the university, so therefore, the findings should be vacated, as it should be here and has been here, then where should the -- but that doesn't mean that the person was wrongfully found involved, it just means the procedures were inadequate. It wasn't a proper determination of that.

Where should that proper determination occur? In

Alger, in GMU, in all the cases that we cite to you, that determination should be made in the first instance, if it's available, at the university level under appropriate procedures.

THE COURT: Right. But that makes no sense here, because you have a student who is no longer at the university, who has already obtained a degree elsewhere, and has really no interest in going back to the university and matriculating. All of that is gone. It's -- the passage of time has eliminated any meaning from that sort of a procedure.

MR. DeBRUIN: Well --

THE COURT: So why should we engage in that?

MR. DeBRUIN: Well, first of all, that's not what he is asking for. He is still asking for his university of Michigan degree. He can't get that under Alger, under George Mason, without going -- having his university record established. There is a pending charge against him. It remains pending. It's -- the finding has been vacated, but the charge hasn't been removed. So he is still seeking relief from the university, and clearly, that's just like reenrollment and finish my degree.

And whether he finishes it by going back to class or he finishes it by getting transfer credits, he is saying, "I want back in the university, I want reenrollment, and I'm going to march toward my degree." And under the cases, Alger

and the other cases that we cite, he is not entitled to that without an appropriate new hearing.

And we're prepared to provide that hearing under procedures that are consistent with due process. And I can address that briefly, because we're being attacked even though, again, no motion has been filed before the Court, nothing has been set forth on those grounds.

But to just at least go to the core points that were made today, there is a claim that the new procedures don't provide for cross examination, that the university continues to defy University of Cincinnati, continues to defy the decision in this very case.

First of all, Cincinnati was decided after the university's resolution of the student misconduct complaint in this case. The Court may recall Cincinnati came down after we had actually argued the motions and shortly before the Court issued its decision. I believe you even issued a decision before we could file something to the Court addressing this new decision from the Sixth Circuit. But that came down after the proceedings in our case.

Cincinnati was also, on its face, a very -- at least it appeared to be a facially-limited decision. It was a situation where the Circuit emphasized, went out of their way to emphasize, this was a two-witness case. There was nobody else who really had any relevant information as to any part of

the incident except the complainant and the respondent. It was a classic, quote, he said/she said case. Those are the words the courts used in Cincinnati. And in that context, the court said the university could not make a decision without the factfinder evaluating the complainant who was making the allegation when the respondent was denying the charge.

Our case has always been very different. The university and the appeals board decision relies most heavily on the testimony of third-party witnesses, witness two. You will remember all of that.

So in terms of whether Cincinnati dictated a different result here, that was far from clear. It was briefed and --

THE COURT: But it is now.

MR. DeBRUIN: It is now. Well, what's more significant is not Cincinnati, but it's the decision in this case.

THE COURT: Right.

MR. DeBRUIN: So we don't -- we don't dispute that any hearing conducted by the university must be conducted in a manner consistent with the Circuit's decision in Doe versus Baum, this very case. And so the university's new procedures, which we have provided to the Court, they were attached to our opposition, are very clear. And at page 31 of those procedures, which again are attached, and I don't know that we

need to spend a tremendous amount of time on this, but just to make clear, there is a section called "The Hearing" and it begins as follows, and I quote: "The hearing is an opportunity for the parties to address the hearing officer in person and to question the other party and/or witnesses and for the hearing officer to obtain information following the investigation that is necessary to make a determination of whether a policy violation occurred."

So the currently-in-place policies are very clear that the hearing is an opportunity for the parties to address the hearing officer in person and, quote, "to question the other party and/or witnesses." And that, in fact, is what the new procedures provide.

Just briefly to address comments that were made about this other case before Judge Tarnow, first of all, that case was not, Judge, just to clarify the record, a matter that was analogous to this case, in that there had been an OIE investigation, followed by an OIE decision, and then followed by Federal Court litigation.

What happened in that case is, during the pendency of the OIE investigation and before there was ever an OIE decision, the plaintiff, represented by plaintiff's counsel here, filed suit and sought to enjoin the university proceedings from continuing. So those proceedings were stopped midstream and Judge Tarnow did issue an injunction

that was basically directed to the old procedures indicating that the old procedures, in his view, did not comport with due process, which is consistent with the Circuit's ruling here.

So we now have new procedures. The new procedures clearly provide for a hearing, a live hearing before a hearing officer with cross examination. And, again, just to contrast the way it was and the way it is now, as the Court knows, under the previous model there was a very thorough investigation by a university investigator, the OIE investigator.

That, Ms. Gordon often lambasts the university for having these two different procedures, one for sexual assault and one for everything else; everything else being the student's rights and responsibilities. Realize that under everything else, student rights and responsibilities, there was no university investigation. There was no university involvement.

So that if a student brought a complaint against another student for theft or whatever it might be, basically, the student had to marshal and bring his or her case. There was no independent investigation by the university. There was a hearing, one student against the accused student, but it was an entirely different process.

And when the university addressed allegations of

sexual assault, which by nature are very different kinds of investigations, they involve trauma between the complainant and the respondent, the university admittedly went to an entirely different model for those cases and those cases alone. There is no dispute about it.

And instead of a process that was solely run by the students, there was this OIE investigation, followed by an OIE decision, followed by an appeal of the OIE decision, all based essentially on the OIE investigatory record, which in this case was some 40 pages long.

That model, in light of the decision by the Sixth Circuit here, has been replaced. The current model is different, so you can't overlay one directly on the other. The current model has an OIE investigation, so there still is an attempt to gather evidence, interview witnesses, bring that together, but there is no OIE decision, and instead it goes to a hearing before a hearing officer for a live hearing where both the complainant, the respondent, other witnesses testify in person before the hearing officer and there is cross examination, as I said. And then from that, there is a relatively limited appeal.

So all I'm saying is, vis-à-vis the relief that the plaintiff is seeking in the papers they filed before the Court, if the plaintiff seeks to go forward to get a university degree and the other things that he is requesting,

the appropriate outcome is for the matter to be resolved for a hearing.

We have spoken to the complainant. She is willing and able to be a participant in a hearing with cross examination, all in accordance with the Circuit's requirements. And we have maintained all along that that should happen before any more time has passed.

We recognize that, as in Alger, if the Court recalls from reading Alger, frequently in these cases where there is litigation, there is a complaint, you know, the passage of time impairs the ability to have a fair hearing. Courts have denied that in the abstract and said, absent a showing that you couldn't get a fair hearing, there are ways to address it. Even witnesses who may have left the school could perhaps testify by Skype, you know, current methods of communication, and so those issues will be left on remand to the university.

THE COURT: All right.

MR. DeBRUIN: Now, if the plaintiff withdrew all of those requests, then I think we could be in a different position. If the plaintiff was only seeking damages for the violation of the due process right, then we might be in a situation where it would be appropriate to have a hearing before this Court, separate the harm from due process from the potential harm from the fact that he was found involved for sexual misconduct, which obviously was an upsetting incident

in and of itself. But that's not the way I read where the plaintiff is today.

Before I lose the Court's patience, I want to briefly address at least two other issues, which is the interim fees in Title IX. Again, on expungement, I think I have already talked about that. We took steps immediately after the Circuit decision to clear his student misconduct file. It's not public in any event and available. The transcript was always clear.

THE COURT: Regardless of whether it was public or not, though, you're telling me that it's clear?

MR. DeBRUIN: Yes.

THE COURT: Okay. Thank you.

MR. DeBRUIN: Yes. And he is not a student. I mean, there is no -- there is no one using his student conduct files to make any determinations. He -- he is no longer a student.

THE COURT: What's the point of a student conduct file? How is it used?

MR. DeBRUIN: Well, it is used if --

THE COURT: Well, let me just add to my question. As I understand what you're saying, a student conduct file is very relevant with respect to current students, but what's the point of a student conduct file after the student leaves the university?

MR. DeBRUIN: So there may be instances where an

employer or another university, a graduate program may ask the student whether or not he or she was adjudicated of any student misconduct. And in those instances, the university cannot say anything unless the student goes to the university, his or her university and says, "I would like you to make a statement as to whether or not my conduct file was clean or not clean."

THE COURT: All right. Now, if John Doe comes to me for a job and I ask him to consent to disclosure, and I have that consent and I go to the University of Michigan and ask, "What's in John Doe's student conduct file," what am I going to learn?

MR. DeBRUIN: So in this particular case or --

THE COURT: Yes.

MR. DeBRUIN: So what John Doe's status is today, there is no misconduct file in his record. There is a pending charge that has not yet been resolved one way or the other.

THE COURT: Okay.

MR. DeBRUIN: And that is no different than any other student who had a charge placed against him or her and that hasn't been resolved yet.

THE COURT: And is that charge a matter of disclosure, or if it's pending it's simply not disclosed at all, even with consent?

MR. DeBRUIN: It's never disclosed without consent.

If --

THE COURT: No, no. If there is --

MR. DeBRUIN: If the student were to consent and say, "My potential employer, a federal judge, has asked what the current status of my file is," the university would make a truthful, accurate statement: "The current status is, you have not been adjudicated of any misconduct. There is a current charge, or there is a pending charge, or there is an unadjudicated charge."

THE COURT: Okay. That answers my question. Thank you.

MR. DeBRUIN: But that would only be, again, pursuant to his express authorization.

THE COURT: All right. Did you want to say something about Title IX?

MR. DeBRUIN: I wanted to say about interim fees and about Title IX --

THE COURT: Oh, yes. Okay.

MR. DeBRUIN: So first I submit, as we do in our papers, an award of interim fees is not appropriate at that time because, again, I submit the plaintiff has not yet prevailed on any claim. We're not to the point of having judgment entered on a partial claim.

And again, in terms of any award of fees, one of the things the Sixth Circuit, the Supreme Court have both said is,

you can't award fees without evaluating.

So, for instance, the Supreme Court said in Phelan versus -- or I'm sorry -- the Sixth Circuit in Phelan versus Bell, 8 F.3d 369, page 373, quoted at length in the Grandzeire case which is in our papers that, "A party who partially prevails is entitled to an award of fees commensurate to the party's success."

And similarly, the Supreme Court, in Hensley versus Eckerhart, 461 U.S. 424, 435, says the District Court should focus on the significance of the overall relief obtained by the plaintiff.

So even in the context of assessing interim fees where there has been partial relief on a claim, what is a critical element is, what is the success that has been obtained? What is the relief that has been obtained?

What we know now is, there is a determination that the plaintiff was entitled -- his due process rights were violated, he is entitled to additional process. But in terms of the other components of the relief being claimed, and in particular any claim that he actually was wrongfully found to be responsible for the misconduct, that has not yet occurred and may never occur.

And so I submit not only are interim fees inappropriate at this point because there is no judgment on any claim, complete or partial, but the Court is not in a

position to be able to evaluate to what extent has the plaintiff succeeded.

Is this -- I mean, if -- if there was a violation of due process, but ultimately no injury because even with process he would have been found responsible, it's a very different case, and I submit a very different success that's been obtained, and that would have a direct impact on what fees are awarded.

There is also, as you know, many claims in this case that have been abandoned. The whole focus of the initial complaint was all about the supposed conflict of interest between Mr. Baum and someone who was in the office of the complainant's lawyer, and that whole part of the case has been abandoned, and you would have to obviously look at all of that before you could even begin to make any judgment on fees. There has been no basis provided to the Court to even begin that exercise, and I just submit, again, it's premature. We're not to the point.

THE COURT: I understand your point. Move on to Title IX.

MR. DeBRUIN: So the last thing I want to say is Title IX, and the plaintiff is aggressively pressing to press forward on Title IX discovery. And I submit it's inappropriate because I think it's basically wasteful or at least premature, and I'll explain why.

So in some Title VII, even potential Title IX claims, the defendant itself has instigated an action, terminated a state employee on grounds that were alleged to be on the basis of race impermissibly or on the basis of sex impermissibly in Title IX.

Here the university did not instigate any charge against the respondent. A complaint was filed by a student. And under Title IX, we actually -- the university has a responsibility to adjudicate that complaint. It's not free to say, "You know, this is a messy area, we don't want to have anything to do with it, take your complaint to the prosecutor, take your complaint elsewhere." We have an obligation under Title IX to adjudicate that complaint.

Now, obviously we have a parallel duty to the respondent to adjudicate that complaint in a way that comports with his Title IX rights, meaning that we can't adjudicate in a way that involves bias against the male respondent any more than we can ignore a complaint brought by a female complainant, or if the sexes could be reversed, whatever it may be. So we have an obligation under Title IX to the respondent to adjudicate that complaint in a manner that is appropriate.

It essentially has already been determined under the due process clause that our adjudication was not adequate and that adjudication essentially must be redone, particularly if

he is seeking relief, as he is under due process, and he is still seeking relief under Title IX.

But the outcome is, if our adjudication was inappropriate, whether because of procedures or because of bias, that procedure has to be redone. The finding has to be rejected, has to be vacated, as it was, and the procedure has to be done in a way that does not involve bias, that does not involve inadequate process. But we have already, I think, all agreed that the procedure does need to be redone. The adjudication has to be repeated. It was -- you cannot rest on what has already occurred.

So to have extensive discovery going to the previous decision of the appeals board and whether that was motivated by some bias of David Baum or any other member of the board is, in large measure, irrelevant, because no one is resting on that decision.

THE COURT: Yes, but if -- but you're ignoring what's happened to Plaintiff Doe over the past three years or however long it's been since he left the university. All of that can't be undone. The fact that he suffered this adjudication if, in fact, it was done in a way that evidenced bias under Title IX, he is entitled to damages for that.

MR. DeBRUIN: Yes. I don't mean to suggest that the only relief would be a new hearing. But, again, what the damages --

THE COURT: So it's not -- it's not wasteful to move the case forward and proceed to the -- to take the necessary steps to adjudicate that claim, is it?

MR. DeBRUIN: I think it is, for this reason. Yes, there may be a damages component. We don't dispute that. There may be damages under the due process clause as well. But what those damages may be may very heavily depend on the outcome of a new procedure consistent with due process, assuming that he is seeking relief that requires that to happen. Because, again, if -- if the outcome of that is, you may have been denied a fair procedure for one reason or another, inadequate procedures, bias, whatever it may be, but the outcome would have been, in fact, the same with adequate procedures, without bias, that is what the purpose of a new hearing is.

I'm not saying there wouldn't be a possibility for any damages, but it will greatly affect the damages that he may seek depending on what the outcome is of a procedure that is consistent with the due process clause and certainly consistent with Title IX.

We don't dispute that our prior procedure was not consistent with Title IX. We don't concede that there was any bias. We vigorously contend that there was not. But there will be a new process if he is seeking relief, as he appears to be, and we're committed to conduct that process in a manner

consistent with due process, consistent with the Circuit decision, and consistent with Title IX, with no bias.

THE COURT: Well, you do recall that the Circuit decision said that there is a viable Title IX claim that should go forward.

MR. DeBRUIN: Of course. And I don't dispute that. But the relief --

THE COURT: I understand your point on that.

MR. DeBRUIN: It goes to the relief that you're ultimately going to get.

THE COURT: Mr. DeBruin, I understand your point on that.

Now, let me ask you a question: If, in fact, you would have to proceed with litigating the Title IX claim, tell me what it is that you would need as far as discovery is concerned.

MR. DeBRUIN: You know, again, you can see the Circuit decision in terms of how these cases normally proceed under Title IX. The only claim that the Circuit upheld was the so-called erroneous outcome claim. And one of the things the Circuit said was --

THE COURT: Mr. DeBruin, I have a pretty clear question, and I don't --

MR. DeBRUIN: I don't believe there is a lot of discovery that is needed, because again --

THE COURT: You would want to take the plaintiff's deposition, presumably --

MR. DeBRUIN: Well, yes.

THE COURT: -- or not? Or anyone else?

MR. DeBRUIN: If -- it may well be in response to what the -- typically it is the plaintiff who is seeking to attempt to establish bias in the university's procedures.

THE COURT: No question, plaintiff has the burden of proof on that, and the plaintiff, I imagine, will have an entirely different answer when I ask her in a minute what discovery she thinks she will need, but I'm asking you what you think you will need to defend your case.

MR. DeBRUIN: I don't believe we will need extensive discovery and, again, we feel that spending a lot of time on the prior decision which we have already vacated is not a productive use of anybody's time.

THE COURT: All right. I thank you.

THE COURT: Ms. Gordon, do you have some brief rebuttal?

MS. GORDON: I do, Judge. Thank you very much.

THE COURT: All right. First of all, answer the question, please, that I just asked Mr. DeBruin.

MS. GORDON: Yes. Yes. I would want to take the depositions of the individuals who have created these policies. One of our --

THE COURT: How many do you think there are?

MS. GORDON: I would say probably five. There is an org chart that I did not bring with me that there is a Title IX office, and then the Title IX office reports, as I understand it, up to the Dean of Students, who eventually reports up to the President of the university. So I would work that out with the other side, but I am going to need to take roughly five to six depositions of decision makers with regard to what they have been doing at the university, with regard to their policies, why they have not adopted the statement of student rights and responsibilities and the like.

THE COURT: And for an erroneous outcome Title IX claim, do you or do you not have to establish a pattern?

MS. GORDON: No.

THE COURT: Okay.

MS. GORDON: I have to show the outcome with regard to my client was erroneous based on his gender being a factor. I would also undoubtedly have to depose whoever's left at the university from that three-person decision-making appeals panel. I know Mr. Baum --

THE COURT: Those are defendants; right?

MS. GORDON: Yes, they are, Judge.

THE COURT: Okay. Okay. Any further rebuttal?

MS. GORDON: Yes. I do want to clarify a couple of things.

With all due respect to Mr. DeBruin, he is just flatly wrong on what he has been telling you about what is on my client's record. It's just not so. I'm going to read to you from ECF Number 107-2 filed 12/10/18. It's Exhibit 2 to my papers. This is what my client received from the university. He is under a permanent voluntary separation effective immediately. He is prohibited from attending university-sponsored events.

THE COURT: This is June 16; right? June 2016.

MS. GORDON: Yes, it is, Judge.

Accessing their property, their facilities.

THE COURT: Is this still in his record?

MS. GORDON: Yes, it is. It's not only in his record, it's literally in effect as I speak to you. He cannot go to a University of Michigan football game or go to the University of Michigan Hospital unless it's an emergency. So that is literally in effect today. It's never been lifted. And I am going to need a court order --

THE COURT: Yeah. Okay.

MS. GORDON: -- to lift it.

Similarly, if you go down to the next paragraph there --

THE COURT: No, I have got it.

MS. GORDON: -- they say he has an obligation to tell other schools that he has a misconduct record. They say that

and they direct him to do that. Okay. So that's on that.

In addition, with regard -- I'm sorry, Judge. I have got to grab my legal pad.

With regard to the Court's point about the TRO, I appreciate the context you're putting it in, but honestly, I think we're past the TRO stage, because the TRO --

THE COURT: I agree.

MS. GORDON: Okay.

THE COURT: We're at the preliminary injunction stage, is where we're at.

MS. GORDON: Right. But even there the finding has already been made that the process was unconstitutional. So I think summary judgment on the constitutionality of the process is more appropriate.

THE COURT: Well, you can file that motion if you want --

MS. GORDON: Okay.

THE COURT: -- but I will tell you this: First of all, I think it would be unwise before I make a ruling on your present motion; and secondly, you should be mindful of the provisions in the local rule that you only get one summary judgment motion without leave of court. So I would be judicious, pardon the phrase --

MS. GORDON: Okay.

THE COURT: -- in your decision on what to file and

when.

MS. GORDON: Okay. So I was picking up on the point that your Honor made earlier about, if I'm seeking interim fees I undoubtedly need some kind of a judgment.

THE COURT: Well, you're not going to get a final judgment until the case is finalized.

MS. GORDON: Well, interim fees are often awarded just on a summary judgment basis if you have achieved substantial relief, as all the cases I have cited to the Court are. There are interim fees when the case is not yet over. That is why they are called interim fees. The plaintiff has obtained substantial relief that is not transient. That is the wording of the court.

For example, some plaintiffs go to the court and say, "I got a TRO. I want interim fees." But then it turns out the TRO is overturned, and the court, the Sixth Circuit says, "That was transient relief. You may have had relief for a moment there. That was transient, and you're -- so, no, you don't get your interim fees." But in cases, Judge, where the rights of the parties have been changed permanently, the legal position between the parties, yes, interim fees are awardable.

This is a little unusual situation because I don't have a summary disposition from the court that I'm working from, but I think the Sixth Circuit decision is the same -- puts the same place marker down with regard to interim fees.

THE COURT: So I take it you are stating, then, that it's a functional equivalent of some sort of a pronouncement of interim relief?

MS. GORDON: Pronouncement of what? I'm sorry.

THE COURT: Interim relief.

MS. GORDON: Yes.

THE COURT: All right. Okay.

MS. GORDON: It's not a close call on these interim fees. It's been litigated quite often.

Okay. So I need to figure out how to get an order so that I can trigger the Court's entertainment of a motion, but I will come up with something. That's number one.

Number two, I want to talk about this issue of the jury trial and the degree. Okay? What I asked the Court to do, Mr. DeBruin is also incorrect on this. I asked -- my client has now amassed, on his own, 55 credit hours, as the Court may or may not recall.

THE COURT: Away from the University of Michigan?

MS. GORDON: Yes. At the cost of the $30,000.

THE COURT: No, I understand.

MS. GORDON: He only needed 13.5 hours to graduate from the University. I begged them to let him take the courses remotely, because the whole point of Title IX, if you're accusing somebody of sexual misconduct, is that the person who says she has been harassed does not have to be

subjected to it again, and he would be off campus. They said no. That's what they decided to do, which has now placed me in the position of standing here and saying, I want them to take a look at the 55 hours and I want them -- because I have given you the link to the business school where they have discretion to award hours from other schools. So I say to the Court today, my client took it upon himself in an unbelievable amount of work and effort to amass 60 credit hours in one year's time period.

THE COURT: You mean he needed to do that because they wouldn't transfer some credits, is that why?

MS. GORDON: Because the school he graduated from did not -- they require you to take prerequisites. You can't parachute in and say --

THE COURT: Got it. I got it.

MS. GORDON: You understand.

THE COURT: So why is that not simply an element of damages to your due process claim?

MS. GORDON: Well, it is an element of damages, but if the Court would say, as part of equitable relief, which you can do, that they need to consider giving him -- crediting some of those 55 hours and hopefully it would be enough for him to obtain the 13.5, he would then have his degree, because he has earned the degree.

Mr. DeBruin --

THE COURT: Doesn't he have a degree, an undergraduate degree from another university?

MS. GORDON: He does. Yes. But it is not a business degree. It's a degree in accounting. And it is not from the University of Michigan Ross School of Business, which they tout on their website as being one of the top three degrees in the country one can obtain in business.

THE COURT: I understand the difference.

MS. GORDON: So you understand. And my client's lifetime earnings will undoubtedly be affected in that he doesn't have the Ross degree that he earned. So all I said in my papers was, I would like this Court to order, as part of equitable relief, that they take a look at crediting him and then we can go on from there with regard to whether he actually engaged in misconduct if that becomes necessary.

Okay. The next thing I want to talk about is with regard to the money damages and the degree. If this Court is not going to adopt my suggestion on the degree, then we do want a jury trial to seek money damages if the jury finds that he would not have been found to have engaged in a misconduct had he been given due process.

We are going to seek money damages for the value of the degree he lost. And I do take that position in my papers. Again, Mr. DeBruin is wrong. He said I have come in here today with a new argument. On page 8 of my brief as to

imposition of a remedy, I ask for legal relief, damages. "Beyond injunctive relief, plaintiff has the ability to receive compensatory damages. This will require a jury trial. Plaintiff acknowledges that the jury would first have to find that plaintiff had not violated the policy." I'm well aware of that. So that's what we are seeking.

THE COURT: So why shouldn't I approach the awarding of a degree in the same way?

MS. GORDON: That's fine. That is fine. I would agree to. Let's have a --

THE COURT: I think -- hear me out.

MS. GORDON: Yes.

THE COURT: I think maybe the sensible way is to proceed to a jury trial on that issue, however, in terms of equitable relief you would be trying that claim to the Court.

MS. GORDON: I agree.

THE COURT: With perhaps an advisory jury.

MS. GORDON: I think that's right. Or I could come to you after the jury rules. I did have another case in this building where my client got -- had the option of money damages or being instated to a position that she was passed over for because of her gender, and that was an equitable relief claim at the end.

THE COURT: That was probably a Title VII claim; right?

MS. GORDON: Yes, it was.

THE COURT: Yeah.

MS. GORDON: No, it was actually -- Title IX or Title VII. She was a teacher, so I'm not sure.

THE COURT: I asked you about discovery with respect to Title IX. I presume you're pretty much along parallel course with Title -- with your due process claim as well?

MS. GORDON: Exactly.

THE COURT: Yeah.

MS. GORDON: It would be exactly parallel and it would be really duplicative to have to do this twice, as the Court understands, I'm sure.

THE COURT: Yeah. All right. Thank you.

MS. GORDON: Judge, what's the next step? We wait for your order on this and then you will direct us as to when we can begin discovery?

THE COURT: Yes. I will enter an order on this. Depending on which way we go, I may issue a scheduling order, having considered this dialogue here essentially a Rule 16 conference.

I will direct, however, now, Mr. DeBruin, that the defendant should -- oh, do you have an amended complaint or is it just --

MS. GORDON: I do, and I am glad you mentioned that, Judge. I had an amended complaint that I came to you on with

my motion for reconsideration which was denied. So --

THE COURT: Did I allow you to file that?

MS. GORDON: No.

THE COURT: All right. Since the -- you know, maybe the best thing to do is, since the Sixth Circuit thinned out some of the counts, that I direct -- I'll direct you to file an amended complaint.

MS. GORDON: I think that's right.

THE COURT: So two weeks?

MS. GORDON: Absolutely.

THE COURT: All right. I'm going to direct you to file an amended complaint by the 28th of February and then the response will be due the 14th of March --

MS. GORDON: Okay.

THE COURT: -- to the amended complaint, and then we will proceed from there. And hopefully in the interim I'll have a decision in writing based on this.

Mr. DeBruin, did you want to be heard one more time?

MR. DeBRUIN: Can I just say three things, one in response, that have come up?

THE COURT: Three things?

MR. DeBRUIN: Three things.

THE COURT: Can I negotiate you down to two?

MR. DeBRUIN: One, in terms of -- I just want to make clear that in terms of the discovery that she is identifying

as to why we had the policies that we had, we will object that that's not relevant to any claim in this case.

THE COURT: Okay. Well, we'll take it as it comes.

MR. DeBRUIN: I just want to make that clear.

Secondly, in terms of the letter that he had to stay away from the university, if she had raised that as an issue, I mean, we could have dealt with that.

MS. GORDON: I did raise it. I said the no-contact order --

THE COURT: No, please don't interrupt.

MS. GORDON: I apologize.

MR. DeBRUIN: Again, if we're talking about attendance at Michigan football games, it would -- potentially as an initial -- there was a charge pending, so sometimes those kind of issues of attendance where the complainant could be exist just because there is a pending charge.

THE COURT: Actually, there may be a charge pending, but there is an exoneration at the investigatory level, and there is an appeal that might be pending, so if he is placed in status quo ante there is no adjudication of responsibility.

MR. DeBRUIN: All I'm saying is, these are often dealt with by policies in terms of how to reconcile the competing interests that we're forced to try to reconcile with both the complainant and the respondent.

THE COURT: All right.

MR. DeBRUIN: But the last thing I just want to leave you with is that we believe it would be inappropriate to basically lay -- leave on the table these equitable requests for a degree and credits and deny the university the right to have determination under procedures consistent with due process as to whether or not he is guilty of misconduct, because if he is, he is not entitled to a degree, he is not entitled to the relief that he is seeking.

And under Alger, under all the cases that we have cited, that is not a decision that is made by the court, that is a decision that is made by the university. And so if equitable relief is on the table, as it clearly is, we believe we have the right to proceed with the charge. And if he declines to go forward with that, we will object to equitable relief on the ground that we never had that opportunity.

THE COURT: Okay. Well, you will have an opportunity to object if we go in that direction.

MR. DeBRUIN: I think it's also appropriate to you in terms of what relief and procedures you set forth going forward. We have said in our papers we believe this case should go forward now to a hearing and consistent with the due process the Circuit has required.

THE COURT: The matter is under advisement, except with respect to the filing and scheduling that I just mentioned.

Anything further for the record from the plaintiff?

MS. GORDON: Thank you for your time, your Honor.

THE COURT: For the defendant? From the defendant?

MR. DeBRUIN: No, your Honor. Thank you.

THE COURT: Thank you, Counsel.

You may recess court.

THE CLERK: All rise. Court is now in recess.

(Proceedings adjourned at 3:27 p.m.)

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CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Rene L. Twedt — June 14, 2019

RENE L. TWEDT, CSR-2907, RDR, CRR, CRC — Date
Federal Official Court Reporter